No. 2935

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

# Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Hawaii.



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

**Names and Addresses of Attorneys.**

For Plaintiffs, S. M. KANAKANUI, WILLIAM R. CASTLE and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI:

CASTLE & WITHINGTON, 125 Merchant Street, Honolulu, Hawaii.

For Defendant, United States of America:

S. C. HUBER, Esq., United States District Attorney, Honolulu, Hawaii. [1*]

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*In the United States District Court in and for the District and Territory of Hawaii.*

No. 86.

S. M. KANAKANUI et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**Order Extending Time to Transmit Record on Appeal.**

Now, on this 22d day of January, A. D. 1917, it appearing from the representations of the clerk of this court that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of errors in the above-entitled

*Page-number appearing at foot of page of original certified Transcript of Record.

cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of errors in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to February 23, 1917.

Dated, Honolulu, T. H., January 22, 1917.

HORACE W. VAUGHAN,
Judge, U. S. District Court.

Due service of the above order, and receipt of a copy thereof are hereby admitted this 23 day of January, A. D. 1917.

CASTLE & WITHINGTON.
By W. A. GREENWELL.

Filed Jan. 22, 1917, at 9 o'clock and —— minutes A. M. George R. Clark, Clerk. By Wm. L. Rosa, Deputy Clerk. **[2]**

[Endorsed]: No. 86. In the United States District Court for the Territory of Hawaii. S. M. Kanakanui et al., vs. United States of America. Order Extending Time to Transmit Record on Appeal.

*In the District Court of the United States, in and for the District and Territory of Hawaii.*

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**Statement of Clerk.**

TIME OF COMMENCEMENT OF SUIT:

December 12, 1916 (*nunc pro tunc*, Jan. 28, 1915): Amended Complaint filed.

NAMES OF ORIGINAL PARTIES:

Plaintiffs: S. M. Kanakanui, William R. Castle and William R. Castle as Trustee for said S. M. Kanakanui.

Defendant: The United States of America.

DATES OF FILING OF THE PLEADINGS:

December 12, 1916 (*nunc pro tunc*, Jan. 28, 1915): Amended Complaint.

April 1, 1915: Demurrer.

DECISIONS:

December 9, 1916: Decision by Clemons, J., sustaining demurrer of defendant.

December 14, 1916: Judgment by Clemons, J., filed and entered.

DATES OF FILING OF THE PLEADINGS ON APPEAL:

December 26, 1916: Petition for Writ of Error and Allowance.

December 26, 1916: Assignment of Errors.

December 26, 1916: Writ of Error.

December 26, 1916: Citation on Writ of Error. [3]

United States of America,
Territory of Hawaii,—ss.

I, George R. Clark, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; and the time when the judgment herein was rendered and the judge rendering the same in the cause of S. M. Kanakanui, William R. Castle, and William R. Castle as Trustee for said S. M. Kanakanui, Plaintiffs, vs. The United States of America, Defendant, Civil Docket No. 86, in the United States District Court for the Territory of Hawaii.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 31st day of January, A. D. 1917.

[Seal] GEORGE R. CLARK,
Clerk, U. S. District Court, Territory of Hawaii. [4]

*In the District Court of the United States in and for the District and Territory of Hawaii.*

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE as Trustee for said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERCIA,

Defendant.

**Amended Complaint.**

S. M. Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui, residents of the city and county of Honolulu, Territory of Hawaii, in the District of Hawaii, file this their petition against the United States of America, and for cause of action allege:

That in the said District Court of the United States in and for the District and Territory of Hawaii, in an action there pending between the said United States of America, plaintiff and petitioner, and the said S. M. Kanakanui, William R. Castle, and William R. Castle as trustee for said S. M. Kanakanui, for the condemnation of all the right, title, interest and estate of said S. M. Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui for public use in and to a certain tract of land situated at Waikiki, in said city and county of Honolulu, bounded and described as follows, to wit: [5]

Beginning at a point on the northeast or landward side of Kalia Road, bearing by true azimuth 173° 05′ 20″, and distant 499 feet from a copper bolt in a concrete monument on the seaward side of said Kalia Road, said copper bolt being 1.65 feet from the north corner of the former Hobron property, and being located by the following azimuths and distances:

To Rocky Hill Triangulation Station 200° 51′ 20″, 8,683.0 feet,

To Leahi Triangulation Station 314° 38′ 10″, 11,077.5 feet,

To Kaimuki Triangulation Station 275° 24′ 10″, 12,142.8 feet,

the boundary runs by true azimuths as follows:

1. 166° 50′ 00″ 247.57 feet along the northeast side of Kalia Road; thence
2. 237° 10′ 00″ 116 feet along the property of the U. S.; thence
3. 352° 00′ 00″ 268.6 feet along the property of the U. S.; thence
4. 345° 00′ 00″ 220.4 feet along the property of the U. S.; thence
5. 62° 28′ 00″ 95.06 feet along the property of the U. S.; thence
6. 61° 39′ 14″ 61 feet across Kalia Road, along the property of the U. S.; thence
7. 62° 28′ 607 feet more or less along the property of the U. S. to a point on the mean high-water mark;
8. Thence westerly along the meanderings of the mean high-water mark to a point on said mean high-water mark which bears 59° 30′, and is

distant 760 feet more or less from the point of beginning; thence

9. 239° 30′ 760 feet more or less along Ocanic avenue to the point of beginning.

Containing an area of 4.3 acres, more or less.

Together with all water, riparian, fishing and other rights, and rights of way and other easements, incidental or appurtenant to the aforesaid tract and parcel of land.

a decree was entered condemning the said right, title, interest and estate of said S. M. Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui for the public use of the United States, that is to say, the erection and maintenance thereon of a military post and fortification and for other uses, in which decree it was determined that the value of all improvements on said property condemned to which the said S. M. Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui were entitled to be paid was [6] fixed at two thousand dollars ($2000), and the value of the right, title, interest and estate of said S. M. Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui in the aforesaid tract or parcel of land and its appurtenances was fixed and determined to be the sum of three thousand dollars ($3000); and it was therein decreed that, upon the payment into the registry of this court of the said sum of five thousand dollars ($5000), being the amount of said two sums, in lawful money of the United States by the United States of America, all the right, title, interest and estate of the said S. M.

Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui in and to the property described should vest absolutely in the United States of America, which decree was a final decree in said action and was duly entered in said court on the 7th day of September, 1911.

That the said United States of America has not paid into the registry of this court the said sum of five thousand dollars ($5000), or any sum, or to the said plaintiffs, or any of them, the said sum or any part thereof, and that two years since said final judgment have elapsed, and all rights obtained by the United States of America in the said judgment have been lost by it, and that the said United States of America, at no time during said two years following said final judgment, notified the plaintiffs or either of them that they did not claim under said judgment, but at all times did suffer the said judgment to remain and did claim under the same.

That by reason of the premises, and particularly by reason of the act of March 3, 1887, 24 Stat. 505, these plaintiffs were entitled to recover against the United States upon a claim [7] founded upon the Constitution of the United States, upon the laws of Congress, upon a contract express or implied, and for their damages in a case not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable; and they further allege that they are entitled to recover also against the United States by reason of the provisions of Section 505 of the Revised Laws of

Hawaii, 1905, now section 676 of the Revised Laws of Hawaii, 1915, and pursuant to said Constitution and laws.

That the said S. M. Kanakanui, William R. Castle and William R. Castle as Trustee for said S. M. Kanakanui paid the sum of eleven hundred dollars ($1100) for attorney's fees in the preparation and trial thereof, and the further sum of sixty-four and 85/100 dollars ($64.85) for witness fees and other expenses, all of which expenses were reasonable and reasonably incurred, and were damaged in the sum of five thousand dollars ($5000) for the loss of the use of said property, and for the interest on said five thousand dollars ($5000) at the rate of seven (7) per cent, per annum from the 11th day of October, 1911.

WHEREFORE, the plaintiffs pray judgment against the said United States of America for the sum of Six Thousand One Hundred Sixty-four and 85/100 Dollars ($6164.85).

Dated, December 12, 1916.

(Sgd.) S. M. KANAKANUI.
(Sgd.) WILLIAM R. CASTLE.
(Sgd.) WILLIAM R. CASTLE,
Trustee for S. M. Kanakanui.

CASTLE & WITHINGTON,
Attorneys for Plaintiffs. [8]

**Order.**

Let this Amended Complaint be filed *nunc pro tunc* as of the date of the filing of the original Complaint

herein, and let the within amendments be, and they are hereby allowed.

12 Dec. 1916.

(Sgd.) CHAS. F. CLEMONS,
Judge of the Above Court.

City and County of Honolulu,
Territory of Hawaii,—ss.

S. M. Kanakanui, William R. Castle and William R. Castle, Trustee, the plaintiffs above named, being duly sworn, each for himself says that he has read the foregoing complaint and knows the contents thereof, and that the facts therein stated he believes to be true.

(Sgd.) S. M. KANAKANUI.
(Sgd.) WILLIAM R. CASTLE.
(Sgd.) WILLIAM R. CASTLE,
Trustee for S. M. Kanakanui.

Subscribed and sworn to before me this 12th day of December, 1916.

(Sgd.) W. A. GREENWELL, (Seal)
Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: No. 86. (Title of Court and Cause.) Amended Complaint. Filed Dec. 12, 1916. (*nunc pro tunc* Jan. 28, 1915.) at 3 o'clock and 55 minutes P. M. (Sgd.) George R. Clark, Clerk. [9]

*In the District Court of the United States, in and for the District and Territory of Hawaii.*

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

**Demurrer.**

Now comes the defendant, The United States of America, by Jeff McCarn, United States Attorney for the District and Territory of Hawaii, and demurs to so much and such parts of the bill of complaint of S. M. Kanakanui, William R. Castle, and William R. Castle, as Trustee for said S. M. Kanakanui filed in this cause as seeks to recover damages in the sum of five thousand dollars, ($5,000) for the loss of the use of the property described in said bill of complaint and for interest on said five thousand dollars ($5,000) at the rate of seven per cent (7%) per annum from the 11th day of October, 1911, and for cause of demurrer to that part of said bill of complaint seeking to recover said damages, says: **[10]**

I.

a. Plaintiffs fail to allege and show in said bill of complaint that they were ever deprived of the use of said property;

b. Plaintiffs fail to allege or show that the defend-

ant, The United States of America, were ever in possession of said property, or that the defendant ever had the use of the same, either before or after the entering of the final decree in the condemnation proceedings complained of;

c. Said bill of complaint fails to allege or show that any one authorized to bind The United States of America, or to act for the United States of America in the premises, took charge of, had possession of, or deprived the plaintiffs of the use and possession of the property described in the bill of complaint;

d. Section 505 of the Revised Laws of Hawaii, 1915, providing for the payment of interest at the rate of 7% per annum in certain cases, does not and cannot bind the United States of America in this action.

II.

That plaintiffs' said bill of complaint does not allege or show that plaintiffs, or any one of them, ever owned any estate, title or interest in or to the property described in plaintiffs' bill of complaint.

III.

That plaintiffs have not shown or alleged any fact or facts from which it can be ascertained what the interests, if any there be, of the several plaintiffs are, nor is it alleged that plaintiffs have now, or that they have ever had, any estate, title or interest in said property. [11]

IV.

That the bill of complaint in this cause shows that the title to the real estate described in said bill of complaint never vested in the defendant, the United

States of America, hence no binding obligation ever rested upon the defendant to pay the award and no such obligation, therefore, now exists to pay the said sum, or any part thereof, by way of damages.

V.

That the right of the defendant, the United States of America, to condemn property for public uses is not the creation of the Territorial statute and such right cannot, therefore, be controlled or limited by any Territorial statute.

VI.

That section 505 of the Revised Laws of Hawaii, 1915, under which this action was brought, undertakes to authorize the recovery of costs of court, reasonable expenses, and such damages as may have been sustained by reason of the bringing of the action, but said section does not apply to this defendant for the following reasons, viz:

a. Because the United States never pay costs;

b. This statute does not and cannot bind the United States of America;

c. No damages are shown or alleged to have been sustained by reason of the bringing of the action for condemnation.

VII.

That the plaintiffs have not, in and by said bill of complaint, made or stated such a cause as doth or ought to entitle them, or either of them, to any such relief as is thereby sought and prayed for, from or against the defendant, the United States of America.

WHEREFORE, this defendant demands the judgment of this Honorable Court whether it shall be compelled to make any further or other answer to said bill of complaint, or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

(Sgd.) JEFF McCARN,
United States Attorney.

I HEREBY CERTIFY, that in my opinion the foregoing demurrer is well founded in point of law, and the same is not filed for the purposes of delay.

(Sgd.) JEFF McCARN,
United States Attorney.

[Endorsed]: No. 86. (Title of Court and Cause.) Demurrer. Filed April 1st, 1915. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy. **[13]**

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*In the United States District Court for the Territory of Hawaii.*

OCTOBER A. D. 1916, TERM.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**Opinion.**

December 9, 1916.

Eminent Domain—Abandonment of Proceedings—Suit Against Government for Resultant Damages to Property Owner: The United States prosecuted proceedings for condemnation of lands to a judgment of condemnation and valuation, which provided in accordance with the laws of Hawaii that upon payment of the damages title should vest in the Government. Over two years passed without such payment, and the property owners, respondents in the condemnation suit, sued the United States under the Tucker Act (24 Stat. 505), providing for suit on claims founded upon the Constitution and laws of the United States or upon contracts express or implied, or for damages in certain cases wherein the United States is suable, and under Revised Laws of Hawaii, 1905, sec. 505, providing that upon failure to pay the fixed price within two years all rights under the judgment of condemnation shall be lost to the Government and it shall be liable for respondents' costs, reasonable expenses and damages sustained by reason of the bringing of the action; the property owners claiming inter alia that the judgment amounted to a taking of property for which compensation was due under the Constitution, Fifth Amendment. Held, that the suit against the United

States was not well founded, for the reason, so far as concerns the local law, that the provision of section 505 as to liability is a matter of substantive law and not of procedure and is therefore not controlling under "conformity" statutes adopting local procedure, and, so far as concerns the Tucker Act, that there was no taking of property for which compensation is due or for which there is any contract express or implied for reimbursement, and that, so far as concerns any claim for damages, such claim as sounding in tort is expressly disallowed by that Act. **[14]**

Action under the Tucker Act, 24 Stat. 505, for damages resulting from abandonment of eminent domain proceedings; on demurrer to complaint.

D. L. WITHINGTON (CASTLE & WITHINGTON with him), for plaintiffs.

S. C. HUBER, United States District Attorney, for the United States. **[15]**

This is an action against the United States to recover damages arising from proceedings to condemn certain land of the plaintiffs. The complaint alleges that on September 7th, 1911, a decree was entered in those proceedings condemning the right, title and interest of the plaintiffs for the public use of the United States and ordering that their right, title and interest should vest in the United States upon the payment of an award of $5,000 damages; that no part of this award has been paid, and that the two years' period fixed by Revised Laws of Hawaii, 1905, section 505, (Revised Laws of Hawaii, 1915, section

675), within which such award should be paid, has elapsed, and under that statute all rights obtained by the United States in the above decree have been lost; and that "by reason of the law and particularly by reason of section 505 of the Revised Laws of Hawaii, 1905," the plaintiffs "are entitled to recover their costs of court, reasonable expenses and such damages as they have sustained by reason of the bringing of said action for condemnation," the specific amounts claimed being $1,100 for attorney's fees in the preparation and trial of the condemnation suit, $64.85 for witness fees and other expenses, $5,000 damages for the loss of the use of the condemned property, and interest on the award of $5,000 at seven per cent per annum from October 11th, 1911. The latter date is thirty days (and a little more) after final judgment, evidently following the provision of section 505, aforesaid, which reads:

> "The plaintiff must within two years after final judgment pay the amount assessed as compensation or damages; and upon failure to do so all rights which may have been obtained by such judgment shall be lost to the plaintiff; and if such payment shall be delayed **[16]** more than thirty days after final judgment, then interest shall be added at the rate of seven per cent per annum. Such payment shall be made to the clerk of the court rendering the judgment, who shall distribute the same in accordance with the order of the court. If the plaintiff shall fail to make such payment as aforesaid, the defendant shall be entitled to recover his costs of court,

reasonable expenses and such damages as may have been sustained by him by reason of the bringing of the action."

The present action is based, as plaintiffs claim, not only directly upon the local statute just quoted, but especially upon the Tucker Act of March 3, 1887, 24 Stat. 505, sections 1 and 2, this court having under the latter section jurisdiction up to ten thousand dollars (see United States v. Foreman, 5 Okla. 237; Johnson v. United States, 6 Utah, 403; United States v. Johnson, 140 U. S. 703), in case of;

"All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." (Section 1.)

The contention is that this action is within the Tucker Act, as being:

(a) A claim founded upon the Constitution of the United States;

(b) Under a law of Congress;

(c) On a contract express or implied.

Though, strictly, the complaint appears to have been drawn in theory on the basis of a right of action under section 505 of the Revised Laws of Hawaii,

1905, nevertheless the case will be considered as if the plaintiffs' allegations were broad enough to unquestionably permit the claims under the Tucker Act, as above stated. And the plaintiffs might rely upon the comprehensive phrase "by reason of the law" in the allegation: [17]

> "That by reason of the law, and particularly by reason of section 505 of the Revised Laws of Hawaii, 1905," plaintiffs "are entitled to recover their costs of court, reasonable expenses, and such damages as they have sustained by reason of a bringing of said action for condemnation."

But this allegation is deemed appropriate for recovery under section 505 of the local law, and is not deemed an allegation of a claim based on a "taking of property" under the Constitution, or a claim based on a contract express or implied. The plaintiffs may amend their complaint, if they wish, so as to remove any question, especially as the evident desire of the United States Attorney is to have the case determined on broad and not technical grounds.

As to this action's being "under a law of Congress," the plaintiffs contend that section 505 of the Revised Laws of Hawaii, 1905, above quoted, is applicable because made so by a law of Congress, 26 Stat. 316, Act of August 18, 1890, as follows:

> "And hereafter the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement, by condemnation, of any land, or right pertain-

ing thereto, needed for the site, location, construction, or prosecution of work for fortifications and coast defenses, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted."

The provision that "such proceedings" are "to be prosecuted" in accordance with the local eminent domain laws, is merely a provision adopting local procedure—a provision not needed in view of the "conformity" statute, Rev. Stat. sec. 914, Judson v. United States, 120 Fed. 637, 642–643; while, on the other hand, the provision of section 505 of the Revised Laws of Hawaii, 1905, allowing damages, expenses, and costs against the government is a provision of substantive law, rather than of procedure. [18]

The former has to do with remedy, with the means or method of enforcing rights; the latter creates rights in certain cases—rights which did not exist before, the government being in the absence of legislation immune from damages or costs. Carlisle v. Cooper, 64 Fed. 472, 474, 475, (C. C. A., Brown, Circuit Justice, Wallace and Shipman, Circuit Judges); and, as to costs, Downs v. Reno, 124 Pac. 582, 583. In the Federal case just cited "a judgment for costs and allowances against the United States upon the dismissal of the condemnation proceedings under the act of August 1, 1888, c. 728, 25 Stat. 357, was reversed because the Court found no authority for

awarding costs against the United States in such case in the act or in any other act," even in spite of the existence of the "conformity" statute, Rev. Stat. sec. 914. See Treat v. Farmers' L. & T. Co., 185 Fed. 760, 763.

The contention, which is the main one, that the action is supported by "a claim founded upon the Constitution," a claim for "just compensation" for property taken for public use, has had full attention, and the court is impressed with the moral considerations which call for relief from the heavy expense, not to mention other disadvantages, brought upon the plaintiffs by their forced participation in these condemnation proceedings; but, in spite of the able argument in the plaintiffs' behalf, and in spite of the recognized difficulties of the question arising out of the varied provisions of law in different jurisdictions, there is no conviction that there was a "taking" here or that the advantage acquired by the government was "property."

There was certainly no taking of the particular property sought to be condemned. The proceedings were only preliminary to a taking. See United States v. Dickson, 127 [19] Fed. 775; Lamb v. Schottler, 54 Cal. 319, 327; Stevens v. Borough of Danbury, 22 Atl. 1071, 1072 (Conn.); Carson v. City of Hartford, 48 Conn. 68, 87, 88, and other cases discussed hereinbelow.

But the strongest argument in behalf of the complaint has been, that by the judgment of condemnation the Government virtually acquired an option to purchase the plaintiffs' interests for a certain sum of

money, that this is a thing of value, property, for which under the Constitution compensation should be paid. And emphasis is laid on the damage suffered through the fact of the tying up of plaintiffs' property for two years,—the interference with the free use and disposition of it because of the so-called lien or cloud upon it resulting from this judgment by which under section 505 of the local laws, the Government by paying the fixed price could at any time within two years acquire title. It is apparent that the plaintiffs have suffered damage and have been put to expense by reason of the condemnation suit, and the judgment, under which the condemnation was to be consummated on payment of a fixed price, might be said to operate as a cloud on the title, but so, in a measure might the very institution and the carrying on of the proceedings, yet for none of these things is the Government liable, unless that cloud results from a "taking" of property. That, however, there here resulted no such legal cloud or lien, see Lamb v. Schottler, 54 Cal. 319, 327.

Was there a taking or acquiring of property by the Government in the so-called "lien" or "option" resulting from the judgment or condemnation? At first sight it might appear so, but on reflection it does not seem that the Government has acquired anything new by this judgment; for it had at all [20] times the right of power to acquire for public purposes that particular piece of land and all interests therein, —or in other words, the owners held it subject to that right or power, and the mere definite fixing of the value for condemnation purposes, the mere decree

that the plaintiffs' property be condemned to be taken by the Government at a certain price does not seem to be, or to amount to, the Government's acquiring of a lien or option in any sense of the word.

By using the equivalent expression "right of purchase" instead of "option," the situation will be more clear. The Government had the right of purchase at the beginning and at all times, the main purpose of the proceedings (at least after the determination of the necessity of the taking) being to fix the price; and yet that right of purchase,—in other words, the mere right of eminent domain,—could never in any true sense be called "property," the taking of which necessitates compensation. Language of the Supreme Court of Connecticut to be later quoted herein may be considered as tending to support the above view (48 Conn. 87–88):

> "But the council considered only—did not take. By considering (after the condemnation proceedings had gone so far as to result in the assessment of damages) no new relation between the city and the land came into being; for at all times the land of the plaintiff and of every other owner is exposed to the right of the public to take it for public use. By considering, the taking became more probable than before; but it remained only a possibility; his exclusive possession was not interrupted; the power to sell was not taken from him; his use was made less profitable only by his apprehension lest a possibility might ripen into a certainty."

And the Supreme Court of California has said, in Lamb v. Schottler, 54 Cal. 319, 327:

> "When, in the exercise of its sovereign right of eminent domain, the State takes the private property of a person, he has but one right—and that [21] is given to him by the Constitution—the right to compensation before he is deprived of his property. The right to take his property in no sense depends upon any contract between him and the public. His assent is not required, and his protestations are of no avail. But, under the Constitution his property cannot be taken until paid for. Up to that time he holds it as he always held it, subject to the right of the State to take it for public use upon compensating him for it. When so taken, the right to compensation, which the Constitution gives him, accrues. That right then, for the first time, would become under the Constitution a vested one. Up to that time he parts with nothing, and the public receives nothing. Prior to that, no lien is impressed upon his property, or cloud cast upon his title, in consequence of any preliminary proceedings. 'Nor indeed can it be said in any legal sense that the land has been taken, until the act has transpired which divests the title or subjects the land to the servitude. So long as the title remains in the individual, or the land remains uncharged by the servitude, there can have been no taking, under conditions which, as already stated, preclude the commis-

> sion of a trespass. Until the price has been ascertained, the Government is not in a position to close the bargain; and when it is ascertained, if the sum is not satisfactory, the Government may withdraw. The Government is under no obligation to take the land if the terms when ascertained are not satisfactory.' (Fox v. W. P. R. R. Co., 31 Cal. 538.) We know of no method by which the Government could have expressed its dissatisfaction with the price fixed upon the Laguna de la Merced more plainly and positively than by the repeal of the act which provided for its acquisition—and that, too, before any step subsequent to the ascertainment of the price had been taken. It is obvious that the public had acquired no new right under these proceedings before the repeal of the act, and quite as clear that the owners of the property had not."

The plaintiffs have been prejudiced, it is true, and the more prejudiced as the proceedings advanced to the judgment of condemnation and of valuation, but this is merely *damnum absque injuria.*

The so-called taking in the present case seems to be such only as was characterized by Mr. Justice Strong as resulting from "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use." He said in the case of Transportation Co. v. Chicago, 99 U. S. 635, 641, 642: **[22]**

"Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. . . . The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly v. Green Bay Company, 13 Wall, 166, and in Eaton v. Boston Concord & Montreal Railroad Co., 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

No authority has been found holding that it is not proper exercise of governmental powers to abandon a condemnation proceeding even after the fixing of the value of the property proposed to be taken—see Lewis, Em. Dom., 3d ed., sec. 955 (656)—with the exception, of course, of certain decisions controlled by statute, as e. g. in Plum v. City of Kansas, 14 S. W. 657 (Mo.), hereinafter mentioned. And such

exercise of governmental powers is still proper even though in a few States a remedy is afforded to reimburse the property owner for damages, costs, etc., incurred. 10 R. C. L. 239, sec. 200. In the absence of such a statute, as section 505 of the local law, under the great weight of authority, if not all authority, a remedy is afforded only where there has been unreasonable delay or malice, but such remedy is expressly excluded by the Tucker Act as sounding in tort. See Id. 238, sec. 200, also In re City of Pittsburg, 90 Atl. (Pa.) 329, 331, col. 2, 332, holding that no such remedy exists apart from the statute. And see 2 Lewis, Em. Dom. 3d ed., 1693, sec. 957 (658).

The opinion in the case of Stevens v. Borough of [23] Danbury, 22 Atl. 1071, 1072, 1073, throws some light on the question of what is a taking, holding, at page 1072, that the fixing of the amount to be paid if the land is taken, constitutes "only a proposed taking"; and it has the following, at pages 1072, 1073, on the matter of damages arising from inconvenience and uncertainty.

> "There may be a hardship in compelling a land or mill-site owner to hold his property in entire uncertainty, after an assessment, whether it will be taken or not; but the inconvenience is of the same kind which attends all proceedings for the taking of land for public improvements, and which is incident to the ownership of property in a community, and especially in a city. This inconvenience was shown in a marked de-

gree in the recent case of Carson v. City of Hartford, 48 Comm. 68, where it was held by the court to give no right."

That there can be no recovery for the mere inconvenience, trouble and expense resulting from the condemnation proceedings, see also, United States v. Oregon R. & N. Co., 16 Fed. 524, 531; McCready v. Rio Grande Western Ry. Co., 83 Pac. 331, 333 (Utah).

In the case of Plum v. City of Kansas, 14 S. W. 657 (Mo.), cited in behalf of the plaintiffs, the Court says, at page 658:

"The issue of law here is whether or not interest runs upon the award of damages assessed as compensation for land taken for public use by the judgment of the Circuit Court, pursuant to the terms of the Kansas City charter of 1875, (Sess. Acts 1875, p. 244, art. 7.) The situation of the parties in interest relative to the subject of controversy is this: Neither the plaintiff nor the city was dissatisfied with the original award fixing the value of plaintiff's property, with a view to its appropriation to public use. The long delay in reaching the end of the condemnation case arose from the acts of other parties. During it the plaintiff remained in possession of the land, but his enjoyment and use thereof were not such as belonged to complete ownership. His tenure, then, might be characterized as a sort of base or qualified fee, liable to be determined at any moment by the issue of the appel-

late proceedings. He could not, with any degree of confidence, improve the property or make any but the most transient agreements for its use. He could not dispose of it except subject to the paramount public easement, which had become impressed upon it. So far as concerned his beneficial rights, as owner, the judgment of condemnation amounted to the taking of the property for public use, and the price for such taking then became justly due him."

But this case is distinguished by the fact that there was no question, as here, of any compensation on account of [24] abandoned proceedings, but under the Missouri statutes "the title to the land is thereby (by the judgment of condemnation) vested in the city for public purposes," Id., col. 2, and such a judgment is differentiated from judgments "under statutes making them merely tentative or expressly or impliedly postponing their final effect," Id., page 659, col. 1.

The cited case of City of St. Louis v. Hill, 22 S. W. 861 (Mo.) involves an undoubted taking, an invasion of property rights in the fixing of a building line which prevented the owner from building on a strip of land forty feet wide. The following language quoted in plaintiffs' brief, has, therefore, no application here, Id., page 862:

> "Property, then, in a determinate object, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment and disposal of that object. It follows from this

promise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of property, though the possession and power of disposal of the land remain undisturbed, and though there be no actual or physical invasion of the *locus in quo.*"

If under that language what was done in the case at bar was a taking, then equally well would the mere institution of the proceedings be a taking, for in the latter case, though in a lesser degree, the use and disposal of the plaintiffs' property was interferred with. Such interference, as has been pointed out in the case of Feiten v. City of Milwaukee, 2 N. W. 1148, 1151 (Wis.), would result from an ordinary action of ejectment, and yet in such case there could not be said to be a taking any more than here.

As to the suggestion of the opinion in the case of Shoemaker v. United States, 147 U. S. 282, 321, upon which [25] the plaintiffs rely, that the assessment of damages in eminent domain presumably includes certain incidental damages such as here complained of, and that if the proceedings are abandoned there should be compensation to cover such damages, it is enough to say that, under the general expression of the authorities, the right to abandon without liability to pay the damages awarded necessarily means the right to abandon wihout payment of any of the included elements of damage.

"The weight of authority undoubtedly is that, in the absence of statutory provisions on the

> question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after condemnation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded." Lewis, Em. Dom. 3d ed., sec. 955 (656).

There is known to us no decision covering the exact question, i. e., no decision in which the acquisition of a so-called "option" or "right of purchase" or "lien" is considered. In United States v. Dickson, 127 Fed. 774, 775, Circuit Judge Pardee went so far as to say, that where "appraisers appointed under the practice in the State of Georgia returned a much larger value for the property than the United States had ever expressed a willingness to pay," and "no physical interference had been made with the property," there had not been any "taking" "of the same in any legal sense." But this is only an opinion of no taking of the property sought to be condemned, and not an opinion of no incidental taking of any property as, e. g., an option as above. In that case a motion of the Government to dismiss the condemnation suit was maintained, it appearing that an intervening Act of Congress had operated as a legislative abatement of the proceedings. Carson v. City [26] of Hartford, 48 Conn. 68, is perhaps more in point. There an assessment of damages had been made as to property proposed to be condemned for a public street. After proceedings had pended for over three years, the city council voted to abandon

the public improvement which required the above property,—and under the city ordinance relating to the opening of streets, it had the right of abandonment, though that fact would not seem to distinguish the case, for if the power of the city to purchase at an assessed price is an "option" or "property," it is, so long as it lasts, no less so in spite of the final right of non-exercise of this option. The Court says, pages 87–88:

> "As we have said that no way was laid out, the Court must stand upon the proposition that if the council considers, for any period however brief, the matters of laying out a way, and a provisional award of damages is made to an owner of land if it shall be taken, and he is delayed thereby in the sale, or omits to make profit by the use of it, the city is responsible in damages.
>
> But, the council considered only—did not take. By considering no new relation between the city and the land came into being; for at all times the land of the plaintiff and of every other owner is exposed to the right of the public to take it for public use. By considering, the taking became more probable than before; but it remained only a possibility; his exclusive possession was not interrupted; the power to sell was not taken away from him; his use was made less profitable only by his apprehension lest a possibility might ripen into a certainty."

Adverting to cases cited in support of the claim of damages, the Court observed, at page 89, "these cases

do not determine the law of an instance of a contemplated but unaccomplished taking for public use." Speaking of the case of Pumpelly v. Green Bay Co., 13 Wall. 166, in which the defendant flowed the plaintiff's land without compensation, and of other cases, it is said, at page 88, "Practically each of these acts was a taking of land, was the actual expulsion and exclusion of the owner from it by force." And of another line of cases, it is said, at page 91, "these again are trespasses, and, as we have said, furnish no precedent for making good to a land-owner profits which he omitted to make because of his belief that the city would take his land." [27]

There are numerous State cases, notably in Maryland courts, holding that where the proceedings are not instituted in good faith, or are kept alive for an unreasonable length of time, and finally abandoned, the owner is entitled to be compensated for his expenses and loss. 10 R. C. L. 238, sec. 200. But, as above noted, an action for relief in such case sounds in tort (Id.) and is expressly excepted from the operation of the Tucker Act. By way of parenthesis, it may be said that, presumably, in the State cases, the States had by legislation consented to be sued for torts as well as on contracts. And most of these cases, and probably all of them so far as consequential injuries are concerned, are it seems grounded upon no idea of the taking of property but rather upon that of the damaging of the property within provisions of law allowing compensation not only for taking but for damaging. See Gibson v. United States, 166 U. S. 269, 275, also Bedford v. United States, 192

U. S. 217, 225; 15 Cyc. 653–654, and see, e. g., Winkleman v. City of Chicago, 72 N. E. 1066 (Ill.), in which condemnation proceedings delayed for several years, were abandoned after more than 15 months from entry of judgment fixing the damages. And see Black v. Mayor of Baltimore, 50 Md. 235, 33 Am. Rep. 320, 323, holding that damages in such cases of wrong are not dependent upon whether the assessments of damages for the taking have been completed or not. See also Shanfelter v. Mayor of Baltimore, 31 Atl. 439 (Md.); also Ford v. Board of Park Commissioners, 126 N. W. 1030, 1032 (Ia.), which says that "perhaps as many, if not more, of the courts," have held that there are no damages [28] even in cases unreasonably delayed and which points out that it is by statute in many States that a right of action has been given.

The fact that it has been found necessary, as in Hawaii (section 505 of the local laws aforesaid), Massachusetts (Downey v. Boston, 101 Mass. 439); Minnesota (Minnesota & N. W. Ry. v. Woodworth, 32 Minn. 452, 21 N. W. 476) and elsewhere (10 R. C. C. 239, sec. 200), to enact legislation giving relief, and the fact that the cases in which relief is given in the absence of such legislation (but doubtless with legislation permitting the Government to be sued for torts) are all cases (as the case at bar is not, under the complaint) of unreasonable delay or want of good faith, seem to militate in some degree against the contentions of the plaintiffs.

So far as the latter class of cases is concerned, it is obvious that any question of delay is quite inde-

pendent of the question of the existence of a taking, and in such cases it is significant that recovery is placed on the ground of unreasonable delay and not on the ground of a taking.

The remedial character of the Tucker Act has been referred to. United States v. Southern Pacific R. R. Co., 38 Fed. 55. That, however, results only in a liberal construction of the Act itself and in no way affects the construction of the word "taking" as used in the Constitution.

If there was not a taking of property, then there could be no basis for a contract express or implied and the claim based on such a contract would fall to the ground. United States v. Lynah, 188 U. S. 444, 462, 472; United States v. Great Falls Mfg. Co., 112 U. S. 645, 656, 657; Peabody v. United [29] States, 231 U. S. 530, 538, 539; McReady v. Rio Grande Western Ry. Co., 83 Pac. 331, 333; Lamb v. Schottler, 56 Cal. 316, 328.

The conclusion from the foregoing considerations, is that the demurrer should be sustained, and it is so ordered. Pursuant to the suggestion above made, the complaint may be amended *nunc pro tunc,* and an amended complaint should be filed, so that the case may be regarded as fully determined on its merits—particularly for purposes of appeal.

(Sgd.) CHAS. F. CLEMONS,
Judge U. S. District Court.

[Endorsed]: No. 86. (Title of Court and Cause.) Decision Sustaining Demurrer of Defendant to Complaint. Filed Dec. 9, 1916, at 10 o'clock and 10 minutes A. M. (Sgd.) George R. Clark, Clerk. [30]

*In the District Court of the United States, in and for the District and Territory of Hawaii.*

S. M. KANAKANUI, WILLIAM R. CASTLE and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**Judgment.**

This cause having come before the Court to be heard upon a demurrer to the complaint, and the Court having heard the arguments of counsel, and having read their briefs, and having filed an opinion in writing in favor of the defendant, and plaintiffs having amended their original complaint in accordance with the order of this court *nunc pro tunc,* to include an allegation of a claim based on a taking of property under the Constitution or on a contract express or implied, in order that the case may be fully determined upon its merits; THEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED: That the demurrer be sustained and that judgment be entered for the defendant and against the plaintiffs, and that the plaintiffs take nothing.

DATED, Honolulu, T. H., December 14, 1916.

By the Court:

(Sgd.) GEORGE R. CLARK,
Clerk.

O. K.—(Sgd.) S. C. HUBER,
U. S. Atty.

To the Clerk:

Let the foregoing Judgment be entered.

(Sgd.) C. F. C.,
Judge. **[31]**

[Endorsed]: No. 86. (Title of Court and Cause.) Judgment. Entered in J. D. Book 3, at folio #19. Filed Dec. 14, 1916, at 10 o'clock and 20 minutes A. M. (Sgd.) George R. Clark, Clerk. **[32]**

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*In the District Court of the United States, in and for the District and Territory of Hawaii.*

October, A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION FOR WRIT OF ERROR AND ALLOWANCE.
ASSIGNMENT OF ERRORS.
WRIT OF ERROR.
CITATION ON WRIT OF ERROR.
BOND ON WRIT OF ERROR.

CASTLE & WITHINGTON,
Attorneys for Plaintiffs. **[33]**

*In the District Court of the United States, in and for the District and Territory of Hawaii.*

October, A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**Petition for Writ of Error and Allowance.**

S. M. Kanakanui, William R. Castle, and William R. Castle, as trustee for said S. M. Kanakanui, petitioners in the above-entitled cause, feeling themselves aggrieved by the decision and judgment sustaining the demurrer to their complaint and denying their claim for damages, and complaining that there is manifest error to the damage of the petitioners in the same, come now, by Messrs. Castle & Withington, their attorneys, and petition said court for an

order allowing said petitioners to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the petitioners shall give and furnish upon said writ of error, and that, upon the giving of such security, all further proceedings in this court be suspended **[34]** and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray.

Dated, Honolulu, T. H., December 23, 1916.

(S.) CASTLE & WITHINGTON,
Attorneys for Petitioners.

Allowed; and the amount of bond on said writ of error is hereby fixed at $300.

(Sgd.) CHAS. F. CLEMONS,
Judge. **[35]**

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*In the District Court of the United States, in and for the District and Territory of Hawaii.*

October, A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

**Assignment of Errors.**

Now come the above-named plaintiffs, S. M. Kanakanui, William R. Castle, and William R. Castle, as trustee for said S. M. Kanakanui, and say that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

1. That the said Court erred in sustaining the demurrer of the respondent to the complaint of the plaintiffs as amended, and in ordering judgment for the respondent.

2. That the said Court erred in entering judgment for the respondent and against the plaintiffs.

3. That said Court erred in holding that the cause of action set forth is not one provided for in the act of March 3, 1887.

4. That the said Court erred in holding that the claim [36] set forth is not one founded upon the Constitution of the United States.

5. That the said Court erred in holding that said claim does not rise under a law of Congress.

6. That the said Court erred in holding that the complaint does not set forth a claim against the United States on a contract express or implied.

Dated, Honolulu, T. H., December 23, 1916.

(S.) CASTLE & WITHINGTON,
Attorneys for Plaintiffs. [37]

*In the District Court of the United States in and for the District and Territory of Hawaii.*

October, A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America to the Honorable CHARLES F. CLEMONS and the Honorable HORACE W. VAUGHAN, Judges of the United States District Court for the District and Territory of Hawaii, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, before you, in the case of S. M. Kanakanui, William R. Castle, and William R. Castle as Trustee for said S. M. Kanakanui, Plaintiffs, v. United States of America, Defendant, a manifest error has happened, to the great prejudice and damage of said petitioners, S. M. Kanakanui, William R. Castle, and [38] William R. Castle as Trustee for said S. M. Kanakanui, as is said and appears by the petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said circuit thirty days after this date, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 26th day of December, A. D. 1916.

Attest my hand and seal of the United States District Court in and for the District and Territory of Hawaii, at the clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal] (Sgd.) GEORGE R. CLARK,
Clerk, United States District Court in and for the District and Territory of Hawaii.

Allowed this 26th day of December, 1916.

(Sgd.) CHAS. F. CLEMONS,
Judge of the District Court of the United States in and for the District and Territory of Hawaii.

*In the District Court of the United States in and for the District and Territory of Hawaii.*

October, A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States of America to the United States of America and to the Honorable S. C. HUBER, United States District Attorney for the District and Territory of Hawaii, its Attorney, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the United States District Court in and for the District and Territory of Hawaii, wherein S. M. Kanakanui, William R. Castle, and William R. Castle as [40] trustee for said S. M. Kanakanui are plaintiffs, and you are defendant in error, to show cause, if any there

be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 26th day of December, 1916, and of the United States the One Hundred and Fortieth.

CHAS. F. CLEMONS,
Judge of the District Court of the United States in and for the District and Territory of Hawaii.

**[41]**

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*In the District Court of the United States, in and for the District and Territory of Hawaii.*

October A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That S. M. Kanakanui, William R. Castle and William R. Castle, as Trustee for said S. M. Kanakanui, as principals, and Henry G. Winkley, as Surety, are held and firmly bound unto the United States of

America in the penal sum of three hundred dollars for the payment of which, well and truly to be made to said United States of America, we bind ourselves and our respective heirs, executors, administrators, successors or assigns firmly by these presents.

THE CONDITION of the above obligation is such that

WHEREAS, on the 23d day of December, 1916, the above bounden principals sued out a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit from that certain judgment made and entered in the above-entitled court and cause on the 14th day of December, A. D. 1916, by the Honorable Charles F. Clemons, Judge of said court.

NOW, THEREFORE, if the said principals shall prosecute their [42] said writ of error to effect and answer all damages and costs if they fail to sustain their said writ of error, then this obligation shall be void; otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF, the said S. M. Kanakanui, William R. Castle, and William R. Castle as trustee for said S. M. Kanakanui, principals, and Henry G. Winkley, Surety, have hereunto set their hands this 23d day of December, 1916.

(S.) WILLIAM R. CASTLE,

(S.) WILLIAM R. CASTLE, Trustee,

Principals.

(S.) HENRY G. WINKLEY,

Surety.

The foregoing bond is approved:

(Sgd.) CHAS. F. CLEMONS,

Judge, United States District Court, Territory of Hawaii. **[43]**

[Endorsed]: No. 86. (Title of Court and Cause.) Petition for Writ of Error and Allowance. Assignment of Errors. Writ of Error. Citation on Writ of Error. Bond on Writ of Error. Filed Dec. 26, 1916. (Sgd.) George R. Clark, Clerk. **[44]**

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*In the District Court of the United States, in and for the District and Territory of Hawaii.*

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,
District of Hawaii,—ss.

I, George R. Clark, Clerk of the District Court of the United States for the Territory of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 45, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same re-

mains of record and on file in my office, and I further certify that I hereto annex the original citation on writ of error and one (1) order extending time to transmit record on appeal.

I further certify that the cost of the foregoing transcript of record is $13.65, and that said amount has been paid to me by the appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 31st day of January, A. D. 1917.

[Seal] GEORGE R. CLARK,
Clerk, United States District Court, Territory of Hawaii. [45]

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[Endorsed]: No. 2935. United States Circuit Court of Appeals for the Ninth Circuit. S. M. Kanakanui, William R. Castle and William R. Castle, as Trustee for said S. M. Kanakanui, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Hawaii.

Filed February 8, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.